

ENVIRONMENTAL PROTECTION COMMISSION[567]

Adopted and Filed

Pursuant to the authority of Iowa Code sections 459.103 and 459A.104, the Environmental Protection Commission hereby amends Chapter 65, "Animal Feeding Operations," Iowa Administrative Code.

The amendment modifies the filing and hearing procedures when an applicant or county demands a hearing before the Commission regarding the Department's preliminary decision on a construction permit application.

Notice of Intended Action was published in the Iowa Administrative Bulletin on July 15, 2009, as **ARC 7961B**. Oral comments were received at three public hearings, and 360 written comments were received during the comment period.

As a result of the comments, the following changes have been made to the amendment as published in the Notice of Intended Action:

- In 65.10(7)"a" and 65.10(8)"a," the 14-day time limit for filing a demand for hearing after receipt of the Department's preliminary decision is increased to 30 days.

- In 65.10(8)"a" and "b," applicants are provided an additional three days in which to contest the Department's preliminary decision if the county has filed a demand for hearing.

- In 65.10(7)"b" and 65.10(8)"a," language is modified to provide that a demand for hearing includes legal briefs, and the scope of responses to a demand for hearing is clarified in 65.10(9)"a"(4).

- In 65.10(9)"a," subparagraphs (5), (6) and (7) are renumbered as subparagraphs (6), (7) and (8), respectively, and new subparagraph (5) is added, which provides that any person may submit, at least 15 days prior to the hearing, written material for review by the Commission and potential inclusion into the record if the material is deemed relevant by the chairperson of the Commission.

- In 65.10(9)"a"(6), numbered paragraph "4," language is added to provide that Commission members or counsel may direct questions to persons "in attendance" at the hearing in addition to persons "appearing" at the hearing.

- In 65.10(9)"a"(7), numbered paragraph "6," language is added requiring the Commission to notify the applicant and the county seven days prior to the hearing if technical experts or consultants have been designated to speak at the hearing; also, in 65.10(9)"a"(6), numbered paragraph "4," language is added to provide that the applicant and the county may direct questions to those technical experts or consultants.

An additional change not related to the comments corrects a typographical error in 65.10(8)"a" by replacing the word "board's" with "applicant's."

This amendment is intended to implement Iowa Code sections 459.103 and 459.304.

This amendment shall become effective March 17, 2010.

The following amendment is adopted.

Rescind subrules 65.10(7), 65.10(8) and 65.10(9) and adopt the following new subrules in lieu thereof:

**65.10(7) County board of supervisors' demand for hearing.**

*a.* A county board of supervisors that has submitted an adopted recommendation to the department may contest the department's preliminary decision to approve or disapprove an application for permit by filing a written demand for a hearing before the commission. Due to the need for expedited scheduling, the county board of supervisors shall, as soon as possible but not later than 14 days following receipt of the department's notice of preliminary decision, notify the chief of the department's water quality bureau by facsimile transmission to (515)281-8895 that the board intends to file a demand for hearing. The demand for hearing shall be sent to Director, Department of Natural Resources, Henry A. Wallace Building, 502 East Ninth Street, Des Moines, Iowa 50319, and must be postmarked no later than 30 days following the board's receipt of the department's notice of preliminary decision.

*b.* The demand for hearing shall include a statement setting forth all of the county board of supervisors' reasons why the application for a permit should be approved or disapproved, including

legal briefs and all supporting documentation, and a further statement indicating whether an oral presentation before the commission is requested.

**65.10(8) *Applicant's demand for hearing.*** The applicant may contest the department's preliminary decision to approve or disapprove an application for permit by filing a written demand for a hearing. The applicant may elect, as part of the written demand for hearing, to have the hearing conducted before the commission pursuant to paragraph 65.10(8) "a" or before an administrative law judge pursuant to paragraph 65.10(8) "b." If no such election is made, the demand for hearing shall be considered to be a request for hearing before the commission. If both the applicant and the county board of supervisors are contesting the department's preliminary decision, the applicant may request that the commission conduct the hearing on a consolidated basis.

*a. Applicant demand for hearing before the commission.* Due to the need for expedited scheduling, the applicant shall, as soon as possible but not later than 14 days following receipt of the department's notice of preliminary decision, notify the chief of the department's water quality bureau by facsimile transmission to (515)281-8895 that the applicant intends to file a demand for hearing. The demand for hearing shall be sent to Director, Department of Natural Resources, Henry A. Wallace Building, 502 East Ninth Street, Des Moines, Iowa 50319, postmarked no later than 30 days following the applicant's receipt of the department's notice of preliminary decision. If the county board of supervisors has filed a demand for hearing, the times for facsimile notification and filing a demand for hearing are extended an additional 3 business days. It is the responsibility of the applicant to communicate with the department to determine if a county demand for hearing has been filed. The demand for hearing shall include a statement setting forth all of the applicant's reasons why the application for permit should be approved or disapproved, including legal briefs and all supporting documentation, and a further statement indicating whether an oral presentation before the commission is requested.

*b. Applicant contested case appeal before an administrative law judge.* The applicant may contest the department's preliminary decision to approve or disapprove an application according to the contested case procedures set forth in 561—Chapter 7; however, if the county board of supervisors has demanded a hearing pursuant to subrule 65.10(7), the applicant shall provide facsimile notification to the department within the time frame set forth in 65.10(8) "a" that the applicant intends to contest the department's preliminary decision according to contested case procedures. In that event, the applicant may request that the hearings be consolidated and conducted as a contested case.

**65.10(9) *Hearing and decision by the commission.***

*a. Hearing before the commission.*

(1) All hearings before the commission requested pursuant to subrules 65.10(7) and 65.10(8) shall be handled as other agency action and not as a contested case.

(2) Upon receipt of a timely demand for a hearing before the commission pursuant to subrule 65.10(7) or subrule 65.10(8), the director shall set a hearing during a regular meeting of the commission scheduled no more than 35 days from the date the director receives the first such request. However, if the next regular meeting of the commission will take place more than 35 days after receipt of the demand for hearing, the director shall schedule a special in-person meeting or an electronic meeting of the commission pursuant to Iowa Code section 21.8.

(3) No later than 5 days from the date the director receives a demand for hearing, the director shall post on the department's Web site the demand for hearing and associated documents, letters notifying the parties of the hearing date, and the department's complete file on the application under review. The director shall provide hard copies of these documents to members of the commission as requested by each member. The director shall contact the applicant and the county board of supervisors and provide copies of documents they request.

(4) No later than 15 days from the date set for hearing, the applicant, the county board of supervisors and the department shall, if any chooses to do so, send one copy of a reply brief to respond to issues raised in the demand for hearing and any supporting documentation to the department. The director shall post the briefs and associated written documents on the department's Web site and provide hard copies to members of the commission as requested by each member. No further briefs or documents shall be permitted except upon request and permission of the commission.

(5) No later than 15 days from the date set for hearing, any person may submit written material for the commission to review. Whether such material is accepted into the record will be the decision of the chairperson of the commission depending on whether the chairperson deems it relevant to the appeal.

(6) The commission shall use the following hearing procedures:

1. All written material accepted by the chairperson of the commission for inclusion in the record at the hearing shall be marked as coming from the person or entity presenting the document.

2. Objections to submitted written material shall be noted for the record.

3. Oral participation before the commission shall be limited to time periods specified by the chairperson of the commission and, unless otherwise determined by the commission, to presentations by representatives for the applicant, the county board of supervisors and the department and by technical consultants or experts designated by the commission. Representatives of the department shall not advocate for either the county board of supervisors or the applicant but may summarize the basis for the department's preliminary decision and respond to questions by members of the commission.

4. Members of the commission, and the commission's legal counsel, may ask questions of the representatives for the applicant, the county board of supervisors and the department and of technical consultants or experts designated by the commission. The members and counsel may also ask questions of any other person or entity appearing or in attendance at the hearing. Representatives for the applicant and the county board of supervisors may ask questions of technical consultants or experts designated by the commission. No other persons or entities may ask questions of anyone making a presentation or comment at the hearing except upon request and permission by the chairperson of the commission.

(7) The commission shall use the following hearing format:

1. Announcement by the chairperson of the commission of the permit application under review.

2. Receipt into the hearing record of the demand or demands for hearing, a copy of the department's complete file on the application under review and the briefs and written documents previously provided by the applicant and county board of supervisors pursuant to subparagraph 65.10(9) "a"(4).

3. Oral presentation, if any, by the applicant if that party timely requested the hearing. If the applicant did not timely request the hearing, then the county board of supervisors shall make the first presentation.

4. Oral presentation, if any, by the applicant or county board of supervisors, whichever party did not have the opportunity to make the first presentation.

5. Oral presentation, if any, by the department.

6. Oral presentation, if any, by technical consultants or experts designated by the commission to assist in its establishment of a record at the hearing. No later than seven days prior to the hearing, the commission shall notify the applicant and the board of the names, addresses and professional capacity of any such technical experts or consultants.

7. Discussion by the commission, motion and final decision on whether the application for permit is approved or disapproved.

(8) Only the issues submitted by the parties in the demand for hearing and responses shall be considered by the commission as a basis for its decision.

*b. Decision by the commission.* The decision by the commission shall be stated on the record and shall be final agency action pursuant to Iowa Code chapter 17A. If the commission reverses or modifies the department's decision, the department shall issue the appropriate permit or letter of denial to the applicant. The letter of decision shall contain the reasons for the action regarding the permit.

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EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 2/10/10.